# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>February 10, 2011 |
| v | No. 295555<br>Iosco Circuit Court |
| KENNETH EDWARD GEORGIEFF,<br><br>Defendant-Appellee. | LC No. 09-005096-FH |

Before: WHITBECK, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

Defendant Kenneth Georgieff was charged as a fourth habitual offender with possession of less than 25 grams of cocaine and possession of less than 25 grams of heroin.[1] The trial court granted his motion to suppress the evidence and quash the information. The prosecution appeals as of right. We reverse and remand for further proceedings. This Court decided this appeal without oral argument.[2]

## I. FACTS

At the preliminary examination, Tawas Police Officer John Walsh testified that he received information concerning Georgieff, a parolee. Specifically, the tip suggested that Georgieff had drug paraphernalia in a shoe in his bedroom closet. Officer Walsh and Tawas Police Chief Mark Fergusen contacted Georgieff's parole officer, Douglas Hedglin. Hedglin decided to do a random search, and Officer Walsh and Chief Fergusen accompanied him. Officer Walsh testified that after arriving at the subject residence, Hedglin explained to Katrina Lewis, who lived with Georgieff and her mother, that he was doing a check of Georgieff's control area. He asked to be directed to Georgieff's room. Neither Georgieff nor Lewis's mother was home at the time.

Lewis testified that she led Hedglin and two police officers to Georgieff's room where they discovered a spoon inside a shoe and a mirrored tray covered with a white substance. She

[1] MCL 333.7403(2)(a)(*v*).

[2] MCR 7.214(E).

also indicated that the recovered shoe belonged to Georgieff, whereas the tray belonged to her mother. Lewis testified that a friend of Georgieff was also in the house and that she told him to leave Georgieff's room.

The prosecution admitted a lab report concerning the white substance at the preliminary examination, but the results were not specified.

Georgieff moved to suppress the evidence and quash the information, arguing that there was no warrant for the search and that 1999 AACS R 791.7735(2), the administrative rule allowing for warrantless searches of parolees, did not apply. Georgieff maintained that the administrative rule required him to be present or that a person in control of the premises be present at the search. Alternatively, he argued that his person or property could be searched but not his residence. Georgieff also argued that a search pursuant to the administrative rule required that a report be filed as soon as possible after the search, but Hedglin did not file a timely report.

At the hearing on Georgieff's motion to suppress, Hedglin testified that he and Officer Walsh searched Georgieff's room. Hedglin stated that he found the tray and that Officer Walsh found the spoon inside the shoe. Hedglin informed his supervisor of the search the next day. He was instructed to write a report after warrants were issued. The search was performed on June 8, 2009. And although the report was not dated, Hedglin believed it was written on July 2, 2009.

The prosecutor claimed that Lewis's testimony established that she had apparent authority to authorize the search and that the report was filed in a timely fashion. However, the trial court granted the motion, stating:

> Apparently it doesn't appear that the young lady, from what I can see, had authority to allow a search of [defendant's] room, number one. Number two, that the regulations weren't followed in a timely fashion, as soon as possible. The written report wasn't filed subsequent to the search.

In denying the motion for reconsideration, the trial court did not elaborate on this analysis. The prosecution now appeals the portion of the trial court's holding regarding the filing of the report.[3]

## II. MOTION TO SUPPRESS EVIDENCE BASED ON THE EXCLUSIONARY RULE

### A. STANDARD OF REVIEW

The prosecution argues that the trial court erred in granting Georgieff's motion to suppress because Hedglin properly conducted the search but simply failed to file a timely written report. This Court reviews a trial court's ultimate decision on a motion to suppress evidence de novo.[4] Although this Court engages in a review de novo of the entire record, it will

[3] The prosecution does not challenge the trial court's finding that the third party who consented to the search was not authorized to do so.

[4] *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2000).

not disturb a trial court's factual findings unless those findings are clearly erroneous.[5] A factual finding is clearly erroneous "'if it leaves [the Court] with a definite and firm conviction that the trial court has made a mistake.'"[6]

## B. LEGAL STANDARDS

Determining if a motion to suppress was properly granted is a mixed question of fact and law.[7] To invoke the exclusionary rule, "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[8] Any deterrent effect "must be weighed against the 'substantial social costs exacted by the exclusionary rule.'"[9] As such, the exclusionary rule "serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[10]

## C. APPLYING THE STANDARDS

Acting pursuant to administrative rule 1999 AACS R 791.7735(2), Hedglin, Georgieff's parole officer, accompanied by two police officers, executed a search of his home after obtaining information that Georgieff was in possession of drug paraphernalia. The search revealed a spoon inside a shoe in Georgieff's closet and a tray in his bedroom that presumably had cocaine and heroin on it. Hedglin informed his supervisor of the search the following day, but he did not file a written report for nearly one month.

The administrative rule on which Hedglin relied provides:

> (1) A parole agent may conduct a warrantless search of a parolee's person or property under any of the following circumstances:
>
> (a) Incident to a lawful arrest pursuant to section 39 of Act No. 232 of the Public Acts of 1953, as amended, being S791.239 of the Michigan Compiled Laws.
>
> (b) A stop and frisk, if there is reasonable cause to believe that the parolee is presently involved in criminal conduct, has violated a condition of parole, or is carrying a weapon.
>
> (c) Seizure of evidence or contraband in plain view.

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[5] *People v Akins*, 259 Mich App 545, 563-564; 675 NW2d 863 (2003).

[6] *Id.* at 564, quoting *People v Manning*, 243 Mich App 615, 620; 624 NW2d 746 (2000).

[7] *People v Marsack*, 231 Mich App 364, 372; 586 NW2d 234 (1998).

[8] *Herring v United States*, 555 US 135; 129 S Ct 695, 702; 172 L Ed 2d 496 (2009).

[9] *Illinois v Krull*, 480 US 340, 352-353; 107 S Ct 1160; 94 L Ed 2d 364 (1987), quoting *United States v Leon*, 468 US 897, 907; 104 S Ct 3405; 82 L Ed 2d 677 (1984).

[10] *Herring*, 129 S Ct at 702.

(d) With the consent of the parolee or a third party having mutual control over the property to be searched.

(2) Where none of the circumstances specified in subrule (1) of this rule are present and there is reasonable cause to believe that a violation of parole exists, a parole agent may conduct a search of a parolee's person or property if, as soon as possible thereafter, the parole agent files a written report with his or her supervisor setting forth the specific reasons for the search, describing the location or place searched, and describing the specific items seized.[11]

Because it found that the written report was not filed "as soon as possible" after the search, the trial court granted defendant's motion to suppress.

"The Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures."[12] "In order to satisfy the Fourth Amendment of the United States Constitution and article 1, § 11 of the Michigan Constitution, a search must be 'reasonable.' As a general matter, this requires that law enforcement authorities obtain a warrant."[13] However, "[a] warrant or probable cause will not be required in such cases as long as the searches meet 'reasonable legislative or administrative standards.'"[14] Administrative rule 791.7735(2) provides this standard.

In *People v Sobczak-Obetts*,[15] we find an analogous decision. There, the police were statutorily required to provide the defendant with an affidavit in support of a warrant at the time of a search, but they failed to do so.[16] The Court observed that the defendant was not challenging the validity of the search warrant itself and did not maintain that her constitutional rights were violated when the warrant was issued and executed.[17] The Court noted that the statute provides "*procedural* requirements that are to be followed by the police during and after

[11] Rule 791.7735.

[12] *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000), citing US Const, Am IV and Const 1963, art 1, § 11.

[13] *People v Goforth*, 222 Mich App 306, 309; 564 NW2d 526 (1997).

[14] *People v Woods*, 211 Mich App 314, 317; 535 NW2d 259 (1995), quoting *Griffin v Wisconsin*, 483 US 868, 873; 107 S Ct 3164; 97 L Ed 2d 709 (1987).

[15] *People v Sobczak-Obetts*, 463 Mich 687; 625 NW2d 764 (2001).

[16] *Id.* at 695. The statute at issue, MCL 780.655, was amended by 2002 PA 112 and now indicates that a supporting affidavit need not be provided.

[17] *Sobczak-Obetts*, 463 Mich at 707.

the *execution* of an otherwise facially valid search warrant."[18] "A violation of [a statute], therefore, does not render the warrant itself invalid, or the search unreasonable."[19]

The Court concluded that the exclusionary rule did not apply to statutory administrative violations, stating:

> [S]uppression of the evidence seized in this case is not an appropriate remedy for the statutory violation at issue. Nothing in the language of [the statute] provides any basis to infer that it was the legislators' intent that the drastic remedy of exclusion be applied to a violation of the statute. Furthermore, the exclusionary rule "forbids the use of direct and indirect evidence *acquired from governmental misconduct*, such as evidence from an illegal police search." The requirements of [the statute] are ministerial in nature, and do not in any way lead to the acquisition of evidence; rather, these requirements come into play only *after* evidence has been *seized* pursuant to a valid search warrant. Because the exclusionary rule pertains to evidence that has been illegally seized, it would not be reasonable to conclude that the Legislature intended to apply the rule to a violation of the postseizure, administrative requirements of [a statute].[20]

In the present case, Georgieff argues that Hedglin did not comply with the administrative standard because he did not file a timely report. However, an administrative technicality is not a basis for the appropriate application of the exclusionary rule.[21] We conclude that the act of failing to promptly file a written report, as required by administrative rule R 791.7735(2), was not "sufficiently deliberate" or "sufficiently culpable" to outweigh the "price paid by the justice system."[22]

As such, the execution of a written report was a ministerial act that was required only after the evidence was properly seized pursuant to a valid administrative search. Accordingly, the trial court should not have excluded the drug paraphernalia found in Georgieff's residence.

We reverse the trial court's order suppressing the evidence of possession and usage of schedule one narcotics and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder

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[18] *Id*. at 707-708 (emphasis in original).

[19] *Id*. at 708.

[20] *Id*. at 710 (internal quotations and citations omitted; emphasis in original).

[21] *Id*.

[22] *Herring*, 129 S Ct at 702.